FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 10 1969
JOHN F. DAVIS, CLERK

MOTION →

IN THE

Supreme Court of the United States

October Term, 1969

Office-Supreme Court, U.S.
FILED
OCT 20 1969
JOHN F. DAVIS, CLERK

No. 66

ANGHEL GOLDSTEIN, a/k/a ANDREI PIETRARU, IULIU NASTA, a/k/a JULIUS NASTA and GHEORGHE FUNDI, On behalf of themselves and all others similiary situated,

Appellants,

against

JOSEPH A. COX and SAMUEL DIFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPHER C. MCGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

MOTION FOR

[redacted] LEAVE TO FILE REPLY BRIEF AMICUS CURIAE AND REPLY BRIEF

WOLF POPPER ROSS WOLF & JONES
By MARTIN POPPER
845 Third Avenue,
New York, N. Y. 10022.
Amicus Curiae

678)

INDEX

PAGE

Petition for Leave to File Reply Brief Amicus Curiae 1

Amicus Curiae Reply Brief 2

I.—Interest of Amicus Curiae 3

II.—Argument 3

CONCLUSION 13

Cases Cited

Bjarsch v. DiFalco, U. S. D. C., S. D. N. Y., 68 Civ. 4216, argued May 2, 1969 ..... 1, 11, 12

Goldstein v. Cox, —— U. S. ——, 36 U. S. L. Week 3285 (January 15, 1968) 9

Gorun v. Fall, 393 U. S. 398, 89 S. Ct. 678 ..... 3, 4

Iaonnou—391 U. S. 604 ..... 8fn, 9

Matter of Kina, 23 N. Y. 2d 720 ..... 7, 9

Matter of Krasowski, 22 N. Y. 2d 827 ..... 7, 9

Matter of Leikind, 22 N. Y. 2d 346, 292 N. Y. S. 2d 681 ..... 4, 5, 6, 7fn, 9

Matter of Marek, 161 N. Y. L. J., No. 97, p. 15, col. 7, May 19, 1969 9

Mora v. Battin, U. S. D. C. N. O., No. C. 68-227, decision filed June 30, 1969 12

Purdy & Fitzpatrick v. California, 71 Cal. 2d —— (July, 1969) 7fn

U. S. v. Pink, 315 U. S. 203, 62 S. Ct. 552 (1942) 10

Zschernig v. Miller, —— U. S. ——, 36 U. S. L. Week, 4120 (January 15, 1968) 4, 5, 6, 8fn, 11, 12

Statutes Cited

PAGE

New York Benefit, Use and Control Statute (SCPA 2218) 4, 5, 7fn, 8fn, 9, 10, 11, 12

Ohio Revised Code, Section 2113.81 12

Treasury List (31 C. F. R. 211.3) 10

Authorities Cited

The Federalist No. 3, Modern Library Edition, p. 13 6

An Act "to Amend the Surrogate's Court Procedure Act" etc., introduced by Committee on Rules No. 5696, introduced May 2, 1969, 1969-1970 Regular Session of New York State Senate 12fn

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 66

ANGHEL GOLDSTEIN, *et al.*,

Appellants,

vs.

JOSEPH A. COX, *et al.*,

Appellees.

PETITION FOR LEAVE TO FILE REPLY BRIEF AMICUS CURIAE

The petitioners herein were granted leave to file a brief Amicus Curiae in support of Appellants' jurisdictional statement after they were refused the consent of the Attorney General who represents the Appellees. The Court also noted probable jurisdiction.

Thereafter, having received the consent of all parties, we filed a brief as Amicus in support of our position that Section 2218 of the Surrogate's Court Procedure Act of New York on its face and as it has been applied by the New York Courts is unconstitutional.

The Attorney General of New York has filed a brief for Appellees in which he argues against our views not only as presented to this Court but also in the Court below. (See p. 11 of Appellees' Brief.) Furthermore, the Attorney General's brief set forth (incorrectly) our position as attorneys for the plaintiffs in *Bjarsch* v. *DiFalco*, U. S. D. C., S. D. N. Y., 68 Civ. 4216, argued on May 2,

1969 before a three-judge Court involving an attack upon the same statute under review in this case.

In the circumstances described above, we sought the consent of the Attorney General of New York as well as the attorney for the Appellant, to file a reply brief as amicus. The attorney for the Appellant has given his consent. The Attorney General, by letter dated August 27, 1969, has advised us "that, in accordance with the direction of the head of our New York City office, the Attorney General *declines to consent* to the filing of any further brief of the amicus." (Emphasis in original.)

In the interest of time, we attach herewith our proposed reply brief, together with this Motion for Leave to File the said brief, and respectfully request that leave of this Court be granted and that the attached brief be filed in this case.

Dated, September 5, 1969

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES,
By MARTIN POPPER
Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 66

ANGHEL GOLDSTEIN, *et al.*,

Appellants,

vs.

JOSEPH A. COX, *et al.*,

Appellees.

AMICUS CURIAE REPLY BRIEF

I

Interest of Amicus Curiae

The interest of the Amicus Curiae in the subject matter of this case has been set forth in the Brief of Amicus Curiae on file with this Court and the statements set forth therein are incorporated herein by reference.

II

Argument

Appellees in effect re-argue their motion to dismiss this appeal, relying again upon *Gorun* v. *Fall*, 393 U. S. 398, 89 S. Ct. 678, affirming a three-judge court's dismissal

of a complaint which sought a judgment declaring the Montana reciprocal inheritance statute to be unconstitutional.

The distinction between *Gorun* and this case is decisive. In *Gorun*, the three-judge court dismissed the complaint on the grounds that "[T]he Montana Court now advised by *Zschernig* of the boundary of the constitutional power of the State . . . should feel free to fashion a procedure for applying §91-520 in a manner not offensive to the Federal Constitution." (Quotation from this Court's opinion in *Gorun, supra.*)

The very point of this appeal, as we have pointed out in our Brief Amicus, is that the New York Courts, including the Court of Appeals, have, despite this court's advice, applied the New York Benefit, Use and Control Statute (hereafter referred to as SCPA 2218) in a manner offensive to the Federal Constitution.

To the degree that the Appellees' brief addresses itself to the question of the manner in which the New York Courts have applied SCPA 2218, it practically concedes that until the decision of the Court of Appeals in *Matter of Leikind*, 22 N. Y. 2d 346, 292 N. Y. S. 2d 681, the New York Courts unlawfully intruded into the area of foreign relations. (See first full paragraph on p. 9 of Appellees' Brief.) Furthermore, Appellees have no where controverted the documentation set forth in the Brief of Amicus demonstrating that the post-*Leikind* decisions continue to apply SCPA 2218 in a manner proscribed by *Zschernig*. The contemporary conduct of the New York Courts is a logical consequence of the fact that the *Leikind* decision itself violates the standards enunciated in *Zschernig*. (See analysis *infra* beginning at p. 5.)

The Court below concluded that the Appellants had made no showing that the New York Courts have intruded

illegally into the area of foreign policy. The Appellees go further, complaining that the Appellants offered no "evidence" in support of their motion for summary judgment, and that therefore "the Attorney General did not deem it proper to undertake the burden of establishing that the statute was *not* being applied unconstitutionally." (Emphasis in original, see p. 8 of Appellees' Brief).

Curiously, the Court below omitted any reference to the comprehensive documentation submitted by Amicus regarding the manner in which the New York Courts have applied SCPA 2218 throughout its history. And that is the only relevant "evidence" in this case.

Now that this Court has noted probable jurisdiction, one would assume that the Appellees would at long last deem it appropriate to controvert the decisional documentation submitted by Amicus Curiae. Their failure to do so stems, in our opinion, from their inability to do so. The record speaks for itself.

We come then to the Appellees' reliance upon the *Leikind* decision.

The first thing that must be noted is that *Leikind* decided only that SCPA 2218 is constitutional on its face and that the petitioner in that case "had made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations," *Leikind*, 22 N. Y. 2d at p. 353, 292 N. Y. S. 2d at pp. 685 & 686.

It is true that the petitioner in *Leikind* made no showing of any kind with respect to lower court conduct in the area of foreign relations. He simply relied upon *Zschernig*. Unlike the petition in *Zschernig*, however, Amicus Curiae have made a full showing of the manner in which the New York Courts have applied SCPA 2218.

What is most significant however is that the *Leikind* decision itself is predicated upon criteria adopted by the Court of Appeals prior to and proscribed by *Zschernig*. As the Chief Judge of the Court of Appeals pointed out in his dissenting opinion, "The majority's conclusion . . . rests upon the assumption that, because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are not in a position presently to assign any part of the funds withheld. (*Matter of Geiger's Estate*, 7 N. Y. 2d, 109, 112, 195 N. Y. S. 2d 831, 833, 164 N. E. 2d 99, 101.) Such an asumption has, to quote from the opinion in *Zschernig*, 389 U. S., at p. 441, 88 S. Ct. at p. 671, 'a direct impact upon foreign relations' and is beyond the competence of the Surrogate's Court."

This is the context in which this Court must weigh the Appellees suggestion that it accept "the cautions" issued by the Court of Appeals in *Leikind*. (Quotation from p. 9 of Appellee's Brief.) These cautions amount to no more than a suggestion that the lower Courts refrain from "animadversions" respecting foreign countries. (See *Leikind*, 22 N. Y. 2d at p. 352, 292 N. Y. S. 2d at p. 685). Apart from the fact that the conclusion reached by the Court of Appeals is itself based upon precedents expressing hostility toward certain foreign governments, the animadversion concept is a narrow, semantic approach to a fundamental constitutional issue.[1] The question involved is not

[1] A principle so fundamental to our system of government as to have been a major reason advanced for adopting the Constitution. See *The Federalist* No. 3, Modern Library Edition, p. 13 in which, at p. 15, the soon-to-become First Justice of the United States pointed out that with respect to the law of nations, ". . . the administration, the political counsels and the judicial decisions of the national government will be more wise, systematical and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more *safe* with respect to us." (Emphasis in original.)

whether state Courts engage in name calling or tactlessness. It is rather whether they intrude unlawfully into the area of foreign relations. If they do so intrude, even though skillfully and politely, they violate the Constitution.

The best proof that the caution urged in Leikind does not meet the test required by the Constitution is that it has had no inhibiting effect upon the lower courts. (See pp. 19-21 of Brief of Amicus. The documentation there cited is uncontroverted.)[1]

The decisions cited in the Appellees' Brief (*Matter of Krasowski*, 22 N. Y. 2d 827 and *Matter of Kina*, 23 N. Y. 2d 720), support our position. In *Krasowski*, the Surrogate and a unanimous Appellate Division found that the Polish petitioners in that case would have the benefit, use and control of their funds. Under New York Law, the Attorney General could not appeal to the Court of Appeals as of right. He was required to seek leave. He sought leave and the Polish petitioners opposed the motion, primarily upon the ground that the Appellant had raised no issue of law of such broad scope and application that an appeal should be allowed.

In his brief in support of his request for leave to appeal, the Attorney General stated: "Although the courts below did not discuss the question, petitioner contended that a determination that Polish beneficiaries would not have the use, benefit and control of their New York lega-

[1] Both the Court of Appeals in *Leikind* and the Court below in this case have indicated that their views on the constitutionality of SCPA 2218 on its face may be overruled by this Court. We have argued in our Brief that the Statute is unconstitutional on its face because it intrudes illegally into the area of foreign relations and because it violates the equal protection and due process provisions of the Fourteenth Amendment, and also that statute as applied violates the same provisions of the Fourteenth Amendment. These contentions are unanswered in the Appellees' Brief. On our Fourteenth Amendment contention, see the recent decision in *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d —— (July, 1969).

cies, would be in violation of the foreign policy of the U. S. . . .

"This obviously is an appropriate subject for regulation under the police power of the state. *Clark* v. *Allen*, 331 U. S. 503, 517 (1947); *Matter of Braier, supra; Matter of Draganoff*, 43 Misc. 2d 233 (Westch. Co. 1964); *Matter of Weidberg, supra*, as the Attorney General argued, relying on *Clark* v. *Allen, supra*. . . .[1]

"It is anticipated that the petitioner will argue in this case and in the *Kina* case, that this result has been altered by *Zschernig* v. *Miller*, —— U. S. ——, 36 U. S. L. Week 4120 (January 15, 1968), which involved the Oregon statute and a treaty situation. However, the Court declined to reconsider *Clark* v. *Allen*. Moreover, there is no treaty in the instant case and the New York statute, unlike the Oregon statute, involved neither reciprocity nor escheat. It should also be pointed out that the question of the validity of the New York procedure may currently be involved in the case of *Goldstein* v. *Cox*, —— U. S. —— 36 U. S. L. Week 3285 (January 15, 1968), remanded by the Supreme Court to the United States Court of Appeals for the Second Circuit for further proceedings in light of *Zschernig* v. *Miller, supra*."[2]

In their opposing brief, the Polish petitioners said, "We do not know whether the court will be inclined, on a motion for leave to appeal, to reach the important constitutional questions briefed herein. We can only suggest, most respectively, that a denial of the appellant's motion

[1] The significant thing about the cases cited by the Attorney General is that they include New York decisions which the Brief of Amicus shows represent flagrant violations of the policy set forth in *Zschernig*.

[2] That SCPA 2218 is a custodial rather than an escheat statute is inconsequential. See opinion of Hon. Justice Douglas in *Iaonnou*, 391 U. S. 604.

on the ground that SCPA 2218 is unconstitutional would lay to rest a question which has plagued the courts of this state for more than a quarter of a century and which is even now the cause of endless litigation."

The Court of Appeals simply denied the motion for leave to appeal, citing *Leikind*, decided the same day. Thus, *Krasowski* adds nothing to *Leikind*. It merely confirms it.

Kina, however, is more revealing, since in that case the Attorney General appealed as of right (the Appellate Division having reversed the Surrogate's finding that the Polish Appellees would not have benefit, use and control of their legacies). The Polish Appellees asked the Court of Appeals to decide the constitutional questions upon the record which clearly showed that the Surrogate had intruded into the area of foreign relations in a direct and drastic manner.

Despite our showing, the Court of Appeals simply affirmed on the facts and declined to reach the constitutional questions, this time not even citing *Leikind*.

Nor did the decision of this Court in *Ioannou* (Cited on p. 9 of Appellees' Brief) and its subsequent implementation by the Surrogate of Bronx County in *Matter of Marek*, 161 N. Y. L. J., No. 97, p. 15, col. 7, May 19, 1969 alter the view of the Court of Appeals. In its opinion in *Leikind*, it cited *Ioannou* in a footnote in which it observed that in *Goldstein* v. *Cox*, *supra*, this Court had ordered that the constitutional issues should be decided by a three-judge court. When one adds this footnote to its observation that this Court might well find that the statute could not be restricted to a routine reading, it is a reasonable assumption that the Court of Appeals considered its decision a transitional one, subject to the ultimate conclusions to be reached by this Court.

In this historical context, Appellees' suggestion that this Court defer to what they describe as the delicacy, wisdom and understanding with which the Court of Appeals has proceeded in the fields of law which touch upon international relations, is without merit. Leaving aside what seems to us a rhetorical overstatement about the traditional sensitivity of the Court of Appeals, *e.g., U. S. v. Pink*, 315 U. S. 203, 62 S. Ct. 552 (1942),[1] the Appellees' suggestion is predicated upon decisional law in situations unrelated to SCPA 2218. The fact remains that with respect to the application of that statute, the Court of Appeals and the lower New York Courts have intruded into the area of foreign relations in a most insensitive and corrosive manner. And that, after all, is what this appeal is about.

The disregard by the New York Courts and the Attorney General of the limits of state power in the field of foreign relations is dramatized by the way in which they have used the Treasury List. (31C. F. R. 211.3) Appellee's Brief stands that issue on its head.

Amicus Curiae make no claim that the Treasury List controls distribution of decedent's estates. To the contrary, we have pointed out that the Treasury List is an exercise of foreign policy—asserted to be such by the Federal Government—and that the tests used by the Federal Government in determining whether a foreign country should be on or off that List "apply solely to the Federal law and regulations and not to questions of law or fact concerning remittances of private funds, including inheritances, and involve "considerations not relevant to re-

[1] On p. 10 of their brief, Appellees say that New York will "be guided or controlled" by Federal policy, whether expressed "by treaty or otherwise". But New York (including the Court of Appeals) disregarded a precise expression of Federal policy in the field of foreign relations involving Romanian legatees. See footnote on p. 10 of Brief of Amicus.

mittances of private funds or other transactions involving rights of private parties." (See Letter of State Department cited on p. 16 of Brief of Amicus and second full paragraph of Letter in the Appendix in Appellees' Brief.)

It is the Appellees who, despite *Zschernig,* insist that a country's inclusion on the Treasury List is conclusive to a determination whether alien residents of that country will receive the benefit, use and control of their estate funds. It is the policy of the State of New York that estate funds belonging to such an alien legatee "shall" be deposited without even affording the alien a hearing to prove that he will have benefit, use and control. See Section 1(a) of SCPA 2218, (Appendix I of Brief of Amicus) added by L. 1968, eff. June 22, 1968, enacted at the request of the Attorney General of New York.

Appellees argue that the validity of Section 1(a) of SCPA 2218 is not at issue on this appeal. We are not so certain. Although the Appellees have changed their position since the time of the oral argument in *Bjarsch* v. *DiFalco,* U. S. D. C. S. D., 68 Civ. 4216 [1] (see Brief of Amicus, p. 3), the fact remains that the Court below cited the entire statute, without distinguishing between Section 1 and the balance of the statute.

In any event, we have argued in *Bjarsch* that Section 1 is as unconstitutional as Sections 2 and 3 because (a) the use of the Treasury List to withhold transmission of estate funds, considering the foreign policy purposes of the List, violates *Zschernig* and, (b) the mandatory deposit of estate funds without affording the alien legatee the right to a hearing at which he can prove that he would have the benefit, use and control of his funds and upon such proof be entitled to receive them, violates the due

[1] *Bjarsch* was argued before a three-judge court on May 2, 1969, decision pending. Sadly, one of the Judges, the Hon. William B. Herlands, United States District Judge, died August 28, 1969.

process and equal provisions of the Fourteenth Amendment.[1]

It should be added that the plaintiff in *Bjarsch* is attacking the validity of SCPA 2218 in its entirety, including Section 1.

Finally, we call the Court's attention to the recent decision of a three-judge Court of the United States District Court for the Northern District of Ohio, which, on the basis of *Zschernig*, struck down the Ohio benefit, use and control statute (Section 2113.81 of Ohio Revised Code) as unconstitutional. *Mora* v. *Battin*, *U. S. D. C. N. O.*, No. C. 68-227, decision filed June 30, 1969.[2]

---

[1] The Attorney General argued in *Bjarsch* that, despite its language, the statute could be interpreted as allowing a hearing to the alien. (See transcript of oral argument.) But since then, at his request, a bill was introduced in the New York Senate to amend Section 1(a) by adding a provision for just such a hearing. See An Act "to Amend the Surrogate's Court Procedure Act" etc., introduced by Committee on Rules ("at request of the State Department of Law"), No. 5696, introduced May 2, 1969, 1969-1970 Regular Session of New York State Senate. May 2 was also the date of the oral argument in *Bjarsch*. The Bill has not been enacted into law.

Because of our uncertainty as to whether this appeal includes a reveiw of Section 1, we have hesitated to include in our briefs the arguments made in *Bjarsch* with respect to that section. However, in our Brief Amicus we stated that we would present these arguments to this Court, if it is disposed to received them.

[2] The Court denied the defendant Probate Judge's motion to dismiss the action based upon his affidavit that, in light of *Zschernig*, he had "abandoned his practice of refusing, as a matter of policy, distribution of assets to heirs residing in Communist countries." He further consented to transfer the assets to the named plaintiffs in the very action before the Court.

The Court considered the defendant's representations "not sufficient to render this controversy moot," among other reasons, because the Ohio statute under review, "is, unless declared otherwise by this Court, a valid part of the law of Ohio."

CONCLUSION

For all the reasons hereinabove stated as well as those stated in the Brief of Amicus Curiae, we urge this Court to reverse the judgment of the Court below and to find that SCPA 2218 is unconstitutional on its face and as applied by the State of New York.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES,
By MARTIN POPPER,
Amicus Curiae.

No. 66

opposition to Motion of Wolf, Popper, Ross, Wulf for leave to file reply Brief as amicus curiae filed on Oct 8, 1969.

(not printed)